

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1559-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

MICHAEL L. THOMPSON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County:
RAMONA A. GONZALEZ, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. The State of Wisconsin appeals from an order granting Michael Thompson's motion for a new trial. The issue is whether the trial court properly exercised its discretion in ordering a new trial. We conclude that it did and therefore affirm.

BACKGROUND

During a fight on April 13, 1996, Michael Thompson allegedly assaulted and injured his wife, Kathy Thompson, and Ron Bion. A jury convicted Michael of substantial battery, contrary to § 920.19(2), STATS., and acquitted him of disorderly conduct, contrary to § 947.01, STATS. He filed a motion for a new trial, claiming that a sheriff's deputy, Michael Collins, committed perjury at his trial.

At trial, Kathy Thompson testified on behalf of the defense as to the events that occurred on the evening in question. She stated that when she arrived home after the fight, Deputy Collins was waiting for her. Collins apparently asked her if her husband, Michael, had kicked her in the stomach. She responded "no." Collins told Kathy that two witnesses reported that Michael had kicked her. Kathy stated that her husband did not kick her. She stated that Collins then asked her if she would show him her stomach so that he could check for any indications that she had been kicked. She did so.

Deputy Collins testified at trial for the State. He testified that Kathy denied being kicked in the stomach. Collins admitted that he asked Kathy if she would allow him to examine her stomach. However, because he did not feel comfortable doing so, he summoned a female officer to the premises. He stated that Officer Michelle Mathison examined Kathy's stomach. Collins further claimed that while Officer Mathison was examining Kathy's stomach, he did not see Kathy's stomach because he was in another room with his back to them. Collins did not include anything in the police report about examining Kathy's stomach.

At the evidentiary hearing regarding the motion for a new trial, Officer Mathison testified that she did not examine Kathy's stomach, and that if Deputy Collins stated that she did, his statement would have been untrue. The trial court granted the defendant's motion for a new trial. The court concluded that Collins' testimony was untrue and that a new trial was warranted in the interest of justice.

STANDARD OF REVIEW

An order granting a new trial is within the discretion of the trial court and may be reversed only if it is established that the trial court erroneously exercised its discretion. See *Burch v. American Family Mut. Ins. Co.*, 198 Wis.2d 465, 476, 543 N.W.2d 277, 282 (1996). We will affirm an order for a new trial if the record shows that the court looked to the facts of the case and arrived at a conclusion consistent with applicable law. See *State v. Eison*, 194 Wis.2d 160, 171, 533 N.W.2d 738, 742 (1995).

DISCUSSION

Section 805.15(1), STATS., provides that a trial court has the authority to grant a new trial "because of errors in the trial, ... or because of excessive or inadequate damages, or because of newly discovered evidence, or in the interest of justice." A trial court's decision to grant a new trial in the interest of justice is highly discretionary and we will usually defer to the trial court's ruling because of that court's opportunity to observe the trial and evaluate the evidence. See *Heideman v. American Family Ins. Group*, 163 Wis.2d 847, 865, 473 N.W.2d 14, 21 (Ct. App. 1991). Furthermore, a new trial may be granted when the verdict is against the great weight and clear preponderance of evidence, even though there exists sufficient credible evidence to support the jury's findings.

See Mossey v. St. Luke's Hosp., 63 Wis.2d 715, 719-20, 218 N.W.2d 514, 516 (1974).

The State argues that the court's conclusions that Collins' testimony was untrue, and that it wrongly undermined the credibility of Kathy Thompson, and are without factual basis in the record. We disagree. At trial, Collins testified that Officer Mathison examined Kathy's stomach. Kathy, on the other hand, testified that Collins was the one who examined her stomach. Officer Mathison testified that she did not examine Kathy, and that if Collins testified that she did, that testimony was untrue. A trial court decides the credibility of witnesses and the weight given their testimony. *See State v. Dunn*, 158 Wis.2d 138, 142, 462 N.W.2d 538, 540 (Ct. App. 1990). When there are inconsistencies within a witness's testimony or between witnesses' testimony, it is the duty of the trier of facts to determine the weight and credibility of the testimony. *State v. Daniels*, 117 Wis.2d 9, 17, 343 N.W.2d 411, 415 (Ct. App. 1983).

The record consists of facts that would allow the trial court to reasonably conclude that Deputy Collins' testimony was untrue. The trial court determined that Kathy Thompson's credibility was of primary importance to resolving the issues of the case, and that Deputy Collins' testimony undermined her credibility. Since the trial court has discretion to grant a new trial, and because the facts suggest that a new trial is warranted, we will not disturb the trial court's decision. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

